1986

State of Utah v. Juan de Dios Cantu: Brief of Appellant

Utah Supreme Court

David L. Wilkinson; attorney general; attorney for respondent.
Jo Carol Nesset-Sale; Salt Lake Legal Defender Assoc.; attorney for appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	: 860052	
Plaintiff/Respondent	:	
vs.	:	
JUAN de DIOS CANTU,	:	Case No. 860052
		Category No. 2
Defendant/Appellant	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction imposed for Aggravated Robbery, a First Degree Felony, in violation of Utah Code Ann. §76-6-302 (1953 as amended); Aggravated Burglary, a First Degree Felony, in violation of Utah Code Ann. §76-6-203 (1953 as amended) and Aggravated Assault, a Third Degree Felony, in violation of Utah Code Ann. §76-5-103 (1953 as amended) in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Raymond S. Uno, Judge presiding.

JO CAROL NESSET-SALE
Salt Lake Legal Defender Assoc
333 South Second East
Salt Lake City, Utah 84111
Attorney for Appellant

DAVID L. WILKINSON
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

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Salt Lake Legal Defender Assoc
333 South Second East
Salt Lake City, Utah 84111
Attorney for Appellant

DAVID L. WILKINSON
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

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STATEMENT OF ISSUES

1. Did the trial court err in not requiring the prosecutor to state the reason for his peremptory challenge of the only minority venireman, where it facially appeared that the venireman was well qualified to serve and the basis for the challenge was his Hispanic status?

2. Was the evidence insufficient to convict Mr. Cantu of the three offenses?

3. Did the trial court err in allowing the charge of aggravated robbery to be submitted to the jury where there was no evidence that any taking or attempted taking was accomplished by force or fear or that any taking was from the person or immediate presence of the victim?

4. Did the trial court err in giving a parties instruction where the evidence was that either Mr. Cantu was himself the victim's attacker or that he was not present in her home at that time?

5. Did the court err in not modifying or arresting judgment when before sentencing it was determine that Mr. Cantu is mentally ill?

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STATEMENT OF THE CASE

The Appellant, Juan de Dios Cantu, appeals from a judgment and conviction imposed for Aggravated Robbery, a First Degree Felony, in violation of utah Code Ann. §76-6-302 (1953 as amended); Aggravated Burglary, a First Degree Felony, in violation of Utah Code Ann. §76-6-203 (1953 as amended) and Aggravated Assault, a Third Degree Felony, in violation of Utah Code Ann §76-5-103 (1953 as amended) in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Raymond S. Uno, Judge presiding.

Statement of Facts

In the early morning hours of December 22, 1984, sixty eight year old Adelia Pippy was awakened when her pillow was removed from beneath her head. A man then pulled her out of bed and demanded money (T. 228). Mrs. Pippy said she saw an unidentifiable form of another man standing in her darkened bedroom (T. 231). Mrs. Pippy described the voice of her assailant as cold and deliberate but did not notice any kind of

accent (T. 282). Mrs. Pippy was then struck with a club on the head, pushed onto the bed and stabbed (T. 233).

Items were taken from throughout the house but Mrs. Pippy testified that she heard nothing being taken after the men left her bedroom (T. 278). No items were taken from her bedroom (T. 247, 363). After an hour or so Mrs. Pippy made her way to a neighbor's house (T. 243), the police were called and Mrs. Pippy was taken to the hospital.

When police came to investigate the crime, they found a jacket near the kitchen that later was determined to belong to the Appellant. The jacket and items in the kitchen had blood stains which a witness testified were consistent with Mrs. Pippy's blood type (T. 416). No fingerprints of the Appellant were found anywhere in the house except on items found inside one of the coat pockets. None of these items belonged to Mrs. Pippy (T. 444). A fingerprint found in the home was not matched with any suspect (T. 436).

Salt Lake City Police Officer Mike Hanks, who arrived quickly on the crime scene, followed footprints from Mrs. Pippy's house to a house in which a Miquel Marcus was staying (T. 463). From conflicting statements given him, Officer Hanks formed an opinion that Miguel Marcus had something to do with the crime (T. 467). No attempt was made to check his juvenile record (T. 535) or secure a photograph of Marcus to show to Mrs. Pippy (T. 547).

Mrs. Pippy later described her assailant as dark complected with normal length hair and no beard (T. 285, 292,

296) and having no accent (T. 282). Oclries Chacon testified that Appellant at the time of the crime had long hair and a beard (T. 474). The trial court noted that Mr. Cantu spoke with a discernible Hispanic accent (T. 758).

During the investigation, Mrs. Pippy was shown an array of photographs and according to Detective John Lomax, Mrs. Pippy indicated that she thought Appellant, whose picture was in the group, was her assailant (T. 527). The officer testified that he commented to Mrs. Pippy that she had identified the suspect and that she had expressed relief for having picked the right man (T. 527).

At a 1:00 p.m. lineup on August 13, 1985, Mrs. Pippy failed to identify Mr. Cantu, assuring the prosecutor and defense counsel that she did not believe the face of her assailant was among those eight men (Addendum A, p. 26). At a 2:00 p.m. Preliminary Hearing the same day, Mrs. Pippy pointed at Appellant, who sat isolated at counsel table, unhesitatingly identified him as her attacker and stated that she would never forget his face (T. 337). She attempted to justify her non-selection minutes earlier by saying that she had been told at the lineup that she needed to be absolutely sure before making an identification but the record of the lineup disputes this. (T. 333 See Addendum A and Exhibit 26, lineup card).

During voir dire at trial Appellant made a motion to quash the jury panel or in the alternative to supplement the venire with minorities because no minority venireperson had been summoned (T. 72). The trial court instructed the jury

clerk to call two minority venirepersons to supplement the venire in this trial (T. 160). One of these minorities was Mr. James Lopez. Mr. Lopez, who appeared to be in his thirties, is L.D.S., married, has a steady job, studied at L.D.S. Business College, and has two children (T. 179). He lived within blocks of another juror who sat on the case. The other specially called venireperson was not in fact a minority member and was subsequently excused for cause (T. 192). Mr. Lopez was peremptorally challenged by the prosecution and Appellant's counsel objected to this peremptory challenge as having been used in a discriminatory fashion (T. 201). Appellant's counsel also made a motion to have the prosecutor testify to have him state under oath whether the Hispanic origin of Mr. Lopez was the reason the prosecutor struck Mr. Lopez (T. 201). The prosecutor, David Walsh, objected to the motion and the court ruled that the law did not allow him to make such inquiry and the prosecutor could use his peremptory challenges as he chose (T. 203). A motion for mistrial on the basis of using "an illegal, inappropriate, racial racist (sic) method to select the jury" was denied by the court (T. 203).

During the course of the trial Appellant's counsel showed Mrs. Pippy a photo and asked if she recognized the man. Mrs. Pippy handed counsel a photo and said, "This is the man" (T. 300). The photo was not of the Appellant and when pressed further a perturbed, frustrated Mrs. Pippy replied that the photo was of a man she had seen on the street (T. 301).

During the trial Mr. Cantu testified that he had indeed entered Mrs. Pippy's house earlier with two others, Irene Garcia and Jeremy Garcia, looking for a warmer coat (T. 583). He believed that the house was empty as he had not seen a car at the house or lights on in the dwelling (T. 584). Mr. Cantu testified that he heard snoring and encouraged the others to leave, and that all left (T. 588). Appellant also testified that later in the evening two other people he knew decided to return to Mrs. Pippy's house to steal items left behind (T. 597). Mr. Cantu swore that he never returned to Mrs. Pippy's house after his earlier entry, when he stole a warmer coat (T. 597).

At the end of the evidence the trial court allowed a parties instruction (Jury Instruction No. 28) over the objection of Appellant's counsel (T. 649).

After Mr. Cantu was convicted but prior to sentencing, Appellant's counsel made a motion to arrest judgment under Utah Code Ann. §77-35-23 (1982 Supp.) because Dr. Breck LeBegue had examined Mr. Cantu and had found him to be mentally ill (R. 132). The court had appointed Dr. LeBegue as alienist at defense counsel's request because of her increasing concerns that Mr. Cantu was not well (R. 137, See Addendum B). When the court refused to arrest judgment, Appellant's counsel asked the court to modify the verdicts from guilty to guilty and mentally ill (T. 720). The court also denied this motion and sentenced Appellant to five years to life for each of the two first degree felonies and zero to five for the third degree felony.

SUMMARY OF ARGUMENTS

The first argument presented on appeal involves the trial court's error in not requiring the prosecutor to explain his peremptory challenge of the lone minority venireperson and denying the motion for mistrial. The prosecutor's use of the peremptory challenge in a discriminatory manner violated Appellant's right to a trial by a jury drawn from a fair cross section of the community.

The second argument is that insufficient evidence was presented on the three charged offenses introduced at trial to find Appellant guilty beyond a reasonable doubt.

The third issue on appeal is that the trial court committed error in allowing the charge of aggravated robbery to go to the jury where no property was taken from the person or immediate presence of the victim.

The fourth point is that the court committed error in giving the parties instruction (Jury Instruction No. 28) when the state's case rested on the victim's eyewitness identification of Mr. Cantu as the man who assaulted her. No evidence was introduced that put the Appellant in the victim's house at the time of the assault other than the eyewitness identification which would make Appellant a principal.

Finally, Mr. Cantu contends that the trial court erred in not modifying or arresting judgment when Dr. LeBegue testified that the Appellant was mentally ill prior the imposition of sentence.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR MISTRIAL AFTER THE PROSECUTOR USED A PEREMPTORY CHALLENGE TO STRIKE A HISPANIC VENIRE PERSON AND NOT REQUIRING THE PROSECUTOR TO EXPLAIN HIS ACTION.

During voir dire the prosecutor peremptorally challenged Mr. John Lopez, a venire-person who objectively was satisfactory but, like Appellant, he is a Hispanic. Appellant's counsel asked the trial court to order the prosecutor to testify to state whether the reason he struck Mr. Lopez was his Hispanic origin (T. 201). The prosecutor objected and the trial court refused to make the inquiry (T. 201). Appellant moved for a mistrial on the basis that the prosecutor had used "an illegal method, an inappropriate, racial, racist method to select the jury" (T. 203). The motion was denied. Mr. Lopez, specially added to the venire over the state's objection, as a minority representative, was the sole racial minority on the venire.

Recently the U.S. Supreme Court in Batson v. Kentucky, 84-6263, 39 Cr. L. 3061 (April 30, 1986) held that a state denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded. The Court also held that a defendant may now establish a prima facie case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial.

This decision reaffirmed the principle of Strauder v. West Virginia, 100 U.S. 503 (1880) where the U.S. Supreme Court

held that a state denied a black defendant equal protection when Blacks had been excluded from the venire. The court said, however, that a defendant has "no right to a petit jury composed in whole or in part of persons of his own race." Strauder at 305. Strauder showed that the Supreme Court was concerned with racial discrimination in the selection of jury venires as have other cases of discrimination in selection of the jury panel. Taylor v. Louisiana, 419 U.S. 522 (1975), Duren v. Missouri, 439 U.S. 357 (1979).

Swain v. Alabama, 380 U.S. 202 (1965), was a case in which the prosecutor used six peremptory challenges to strike the six black persons in the venire. The Supreme Court held the state may not exercise its peremptory challenges to exclude Blacks from the jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to Blacks "The same right and opportunity to participate in the administration of justice enjoyed by the White population." Swain at 224. The Swain Court required, however, that the defendant show the peremeptory challenge system as a whole was being perverted and required a showing of systematic abuse by a prosecutor in more than one case. In this case evidence was presented on Mr. Cantu's behalf that during the three month period, January - March 1983, in every instance in which a venireperson with an Hispanic surname was removed by a peremptory challenge in Third District Court criminal cases, it was the prosecution that removed him or her (T. 312). Batson, however, specifically overturned that evidentiary burden and

ruled that a defendant may show purposeful racial discrimination based solely on evidence concerning a prosecutor's exercise of peremptory challenges at the defendant's trial.

Batson sets out a two-step process by which a defendant may establish a prima facie case of purposeful discrimination by the prosecutor in the use of his peremptory challenges. First, the defendant must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. The defendant may also rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. 39 Cr. L. 3066. Second, the defendant must show that such facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude veniremen from the petit jury on account of their race. Once a defendant has made a prima facie showing of racial discrimination the burden shifts to the state to offer a neutral explanation for challenging the jurors. The Court stated that a prosecutor may not rebut a prima facie showing by saying that he challenged the jurors on the assumption that they would be partial to the defendant because of the their shared race.

In this case the Appellant, Juan Cantu, is a Hispanic and thus is a member of a cognizable racial group, per the United States Census Bureau (See Addendum C) and United States

v. Test, 550 F. 2d 577 (10th Circuit 1976). The prosecutor in this case used a peremptory challenge to strike Mr. Lopez, a venireperson who while Hispanic was in every way qualified to serve on the petit jury (T. 194). Mr. Lopez lives within blocks of another juror who the prosecutor let sit on the jury (T. 190). Lopez is LDS, studied accounting at LDS Business College, is married and has a steady job (T. 179). These facts ought to raise an inference that the prosecutor in this case used his peremptory challenge to remove Mr. Lopez solely on account of his race. Appellant objected to the prosecutor's removal of Mr. Lopez (T. 201) and asked the judge to require the prosecutor to state under oath his reason for striking Mr. Lopez. The prosecutor, David Walsh, objected and the trial court refused to make such inquiry, as in Batson.

While this case involves striking only one Hispanic and Batson involved striking four black persons on the venire, the fact that so few Hispanics are included in jury venires in Salt Lake County requires that prosecutors be barred from using racially motivated grounds for striking any venireperson. The trial court heard evidence that only 2.16% of venirepersons in all criminal trials in Salt Lake County from January through March 1983 had Spanish surnames while Hispanics represented 4.98% of the population at that time (T. 92).

Some states have held that the use of peremptory challenges by the prosecution to exclude persons from a petit jury on the basis of race deprived defendants of their right to

trial by jury drawn fairly from the community. In Commonwealth v. Soares, 387 N. E. 2d 499 (Mass. 1979), a case in which a prosecutor peremptorily challenged twelve of thirteen black members of the venire, the court held that such a systematic use of peremptory challenges in a case denied a defendant his right to trial by a jury drawn from a fair cross-section of the community.

In People v. Wheeler, 583 P.2d 748 (1978) the Supreme Court of California held that a prosecutor's use of peremptory challenges to remove each and every Black from the jury violated the defendant's right to a jury drawn from a respesentative cross-section of the community. In the instant case the prosecutor struck without legitimate cause the only Hispanic and thus the Appellant's right under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 12 of the Utah Constitution to a trial by an impartial jury was violated.

This court quoted People v. Wheeler in State v. Ball, 685 P.2d 1055 (Utah 1984) which reversed a conviction for Driving Under the Influence:

> We agree with the California Supreme Court, which said: In practice, a party will use a peremptory challenge only when he believes that the juror he removes may be consciously or unconsciously biased against him, or that his successor may be less biased.
> To say that peremptories will ordinarily be exercised only in cases of bias, however, does not clarify the kinds of bias upon which the challenge may permissibly be based. In contrast to the limited list of events authorizing a challenge for cause on the ground of

> implied bias (Pen. Code, §1074), the law recognizes that a peremptory challenge may be predicated on a broad spectrum of evidence suggestive of juror partiality. The evidence may range from the obviously serious to the apparently trivial, from the virtually certain to the highly speculative.
> By contrast, when a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds--we may call this "group bias"--and peremptorily strikes all such persons for that reason alone, he not only upsets the demographic balance of the venire but frustrates the primary purpose of the representative cross-section requirement. That purpose, as we have seen is to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences. Manifestly if jurors are struck simply because they may hold those very beliefs, such interaction becomes impossible and the jury will be dominated by the conscious or unconscious prejudices of the majority. Seen in this light, the presumed group bias that triggered the peremptory challenges against its members is indistinguishable from the group perspective we seek to encourage by the cross-section rule.
>
> People v. Wheeler, 148 Cal. Rptr. at 901-903, 583 P.2d at 760-761 (footnotes omitted).

Ball at 1059.

In this case, in light of Mr. Lopez' voir dire responses, and all other known information, it seems that the only reason Mr. Lopez was stricken was because he is a Hispanic, and therefore, unacceptable to the state's attorney who was prosecuting a Hispanic and whose victim is white. An all-white jury assures the prosecutor that the defendant is perceived as different from them and enhances the likelihood that jury members will identify with the white victim, a very real advantage to the state.

Group bias should not be used as a legitimate reason to peremptorily challenge a potential juror. The consequence of this process is that prosecutors are allowed to have jurors whom they expect will be inherently suspect of a minority defendant, if not consciously or unconsciously biased against him. In fact the Salt Lake County Attorney Trial Manual published in 1978 advises prosecutors that minorities per se are poor jurors for blue collar crimes but good for white collar crimes (Addendum D). Because the number of minorities who are called to jury duty is very small, almost never more than one per panel, the four peremptories granted the state will always be sufficient to remove every minority venireperson.

In this case Appellant met the evidentiary burden of Batson and this case should therefore be reversed and remanded for a new trial, unless arguments in other points warrant reversal and cause the court to enter a verdict of guilty of Burglary, a felony of the second degree. Limiting the prosecutor's use of peremptory challenges to preclude racial discrimination will not undermine the legitimate exercise of peremptory challenges. If a prosecutor can provide a neutral explanation for challenging racial minorities, , those challenges should be allowed. Because facially the stricken venireperson was excluded solely because of his race, the prosecutor would not disclose the reason for the challenge, and the court would not order it, this Court must conclude that these facts in conjunction with Batson require a reversal of the convictions.

POINT II

INSUFFICIENT EVIDENCE WAS PRESENTED BY THE STATE TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT.

The jury found the Appellant guilty of aggravated robbery, aggravated burglary and aggravated assault (R. 32-34). The evidence which was presented at trial was insufficient to support the jury's verdict of guilty beyond a reasonable doubt. Mr. Cantu asserted throughout the trial that while he had been in the victim's home earlier in the evening that he had left when he heard snoring and that he knew others had returned (T. 597). He admitted taking a coat from the victim's home because his was not warm enough (T. 583). The only evidence placing the Appellant in the victim's home at the time of the attack was the victim's identification and that identification was so faulty that it does not support the verdict.

In State v. Petree, 659 P.2d 442, 444 (1983) this Court stated ". . . notwithstanding the presumptions in favor of the jury decision this court still has the right to review the sufficiency of the evidence to support the verdict." The Court also noted:

> We reverse a jury conviction for insufficient evidence only when the evidence (viewed in the light most favorable to the verdict) is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he was convicted. Id. (Citations omitted).

In State v. Lamm, 606 P.2d 229, 234-235 (1980) the dissent noted:

> If the circumstances essential for conviction are ambiguous and consistent with the innocence of the accused, then this court must hold as a matter of law that there is no substantial evidence to support the guilt of the accused.

This standard is in accordance with the Due Process requirements which prohibit a criminal conviction in all cases except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a defendant is charged. Jackson v. Virginia, 443 U.S. 307 (1979), In re Winship, 397 U.S. 358 (1970).

Appellant argues that there was insufficient evidence presented to place him at the home of the victim at the time of the assault. The only evidence which exclusively supported that proposition was the identification of the victim, Adelia Pippy, an elderly woman in her bed in a darkened bedroom in the middle of the night (T. 229).

The problems inherent in eyewitness identification have been the subject of much discussion. The late Felix Frankfurter, former Supreme Court Justice said:

> What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent -- not due to the brutalities of ancient criminal procedure . . . .
>
> Evidence as to identity based on personal impressions, however bona fide, is perhaps of all classes of evidence the least to be relied

> upon and therefore, unless supported by other facts, an unsafe basis for the verdict of a jury. Frankfurter, The Trial of Sacco and Vanzetti.

The unreliability of eyewitness identification has been well documented in numerous law review articles in recent years.[1]

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[1] Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 Stan. L. Rev. 969 (1977); Due Process Standards for the Admissibility of Eyewitness Identification Evidence, 26 Kan. L. Rev. 461 (1978); Eyewitness Identification Evidence: Flaws and Defenses, 7 No. Ky. L. Rev. 407 (1980); Ellis, Davies, Shepherd, Experimental Studies of Face Identification 3 Nat. J. Crim. Def. 219 (1977); Use of Eyewitness Identification Evidence in Criminal Trials, 21 Crim. L.Q. 361 (1979). Loftus, Eyewitness Testimony (1979); Public Defender Sourcebook, pp. 251-57 (S. Singer, ed. 1976); Yarmey, The Psychology of Eyewitness Testimony (1979); Buckhout, Determinants of Eyewitness Performance on a Lineup, 1974 Bull. Psychonomic Soc'y 191; Buckhout, Eyewitness Identification and Psychology in the Courtroom, Crim. Def., Sept.-Oct. 1977, at 5-9; Buckhout, Eyewitness Testimony, Scientific Am., Dec. 1974, at 23; Ellis, Davies & Shepherd, Experimental Studies of Face Identification, Nat'l J. Crim. Def. 219 (1977); Levin & Tapp, The Psychology of Criminal Identification: The Gap from Wade to Kirby, 121 U. Pa. L. Rev. 1079 (1973); Luce, The Neglected Dimension in Eyewitness Identification, Crim., Def., May-June 1977, at 5-8; Tyrrell & Cunningham, Eyewitness Credibility: Adjusting the Sights of the Judiciary, 37 Ala. Law. 563, 575-85 (1976).

Thus the Appellant contends that the evidence in this trial suggested that it was "inherently improbable" that he committed the crime. The victim failed to identify Mr. Cantu in an eight-person lineup, at which the participants stood, walked, turned, and then spoke the phrase Mrs. Pippy remembered her assailant having said. She remarked that she did not believe the face of the man who hurt her was there (Addendum A, p. 26). However, one hour later, at the Preliminary Hearing, with Appellant seated alone next to defense counsel, Mrs. Pippy pointed at him, identified him, and shouted, "I'll never forget his face" (T. 337). At Preliminary Hearing and at Trial the victim claimed that the reason she failed to indicate that she recognized anyone in the linup was because she was not one hundred percent certain (T. 334). Yet, at the linup she was asked only if she recognized anyone to which she replied that she did not. (See Addendum A, lineup transcript).

In Simmons v. United States, 390 U.S. 377 (1968) the Supreme Court set a standard for evaluating pretrial photographic identifications which are allegedly "unnecessarily suggestive and conducive to misidentification " The Supreme Court stated:

> . . . each case must be considered on its own facts, and that convictions based on eyewitness idenfication at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

390 U.S. at 384.

The Court also stated in that case:

> . . . The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.

Id. at 383-384.

In this case after the victim had said that she believed that a photograph of the Appellant was that of her assailant, a police officer indicated that she had indeed identified the suspect in the case (T. 527). The victim then expressed relief that she had picked the right one. In this case the victim, who had been unable to identify Mr. Cantu in a lineup, did pick out a photo that she thought was her assailant (T. 527). However, the victim's identification was so shaky that Detective John Lomax, police officer in charge of the investigation, said that he would not have tried to get a criminal complaint on her identification alone (T. 526).

The victim indicated in her initial description that the assailant did not have long hair or a beard yet testimony of Oclries Chacon indicated that Mr. Cantu had long hair and a beard at the time of the attack and that he usually had a beard and long hair (T. 474). At the lineup that is how he appeared and the victim, Mrs. Pippy, was unable to identify him (T. 331).

The array of photographs shown to her by Detective Lomax was also impermissibly suggestive in that four of the six photos were of men with long hair while the victim's description of the assailant was clearly that he had "normal" hair (T. 302). In this case Mr. Cantu normally wore his hair long and the reason the victim was shown a photo of him with short hair was because the photo was taken while the Appellant was in custody for an unrelated matter and short hair was required by the institution.

During trial Appellant's cousel showed the victim the only other photo of a man with short hair from the original photo array. The victim looked at the photo and said, "This is the man" (T. 300). The victim further stated she thought the picture was of Mr. Cantu (T. 300). The photo she identified was not of the Appellant and when Appellant's counsel expressed surprise, the victim retreated and tried to explain away her choice with the implausible statement that she meant this was just a man she had seen on the street (T. 300) (See Addendum F). This does not seem a logical response during trial questioning on the identity of her attacker and shows the inconsistencies and the doubt of the victim's identification of Mr. Cantu as her assailant. Mrs. Pippy also said her attacker had no accent (T. 282), yet the court noted for the record that the Appellant has a Spanish accent (T. 758).

This Court stated in State v. Perry, 492 P.2d 1349, 1352 (1979):

> But the circumstances of the individual case should be scrutinized carefully by the trial court to see whether in the identification procedures there was anything done which should be regarded as so suggestive or persuasive that there is a reasonable likelihood that the identification was not a genuine product of the knowledge and recollection of the witness, but was something so distorted or tainted that in fairness and justness the guilt or innocence of an accused should not be allowed to be tested thereby.

In this case there is a reasonable likelihood that the victim's identification was not a genuine product of her knowledge and recollection but was instead based on an improper photo lineup. Mr. Cantu's photo had been logically included because his identification had been found in a jacket left in the home sometime that evening; however, hair length, rather than facial features, was a critical characteristic of the attacker and it was improper to have included primarily men with longer hair, who were perfunctorily excluded from consideration, enhancing the probability that Appellant or the one remaining short-haired subject would be selected. As one might expect from this unfortunately capricious yet determined, angry victim, at trial her fundamental doubt about who attacked her caused her to select the other short-haired man's photo as the assailant, retreating only after the cross-examination pointed out what she had done.

Another weakness in the state's case concerned the testimony of officer Hanks who stated that he had conscientiously followed the footprints left in the snow from the victim's house to a house in which Miguel Marcus was staying (T. 463). These footprints were in the opposite direction from Appellant's house (T. 451). Officer Hanks testified that he felt that Marcus had something to do with the crime (T. 467). Yet the investigating officer, Detective Lomax, did not follow up on this investigation by Officer Hanks. No check was made to see if Marcus had any police or juvenile record and no attempt was made to show the victim any photo of Marcus. This physical evidence suggests that the Appellant's version of what happened that night is entirely reasonable and that considering all the circumstances, there was insufficient evidence that Juan Cantu was in the home at the time of the attack.

Given the limited physical description the victim was able to provide (which suggests an unreliability of any subsequent identification), the suggestive photographic array, the confirming statement by the police officer after her selection of Appellant, the failure of the victim to identify or recognize Appellant at an in-person lineup (after watching him and hearing him speak), her brazen selection of him in isolation as the defendant in a Preliminary Hearing an hour later, and her initial identification of another man's photo at trial as her attacker, it is clear that this elderly victim did not really know at all who had attacked her, but had relied

upon statements by police and the fact that the state had charged Mr. Cantu on her compelling but inaccurate statement, "I'll never forget his face." Petree ought to compel this Court to find the evidence insufficient to convict of aggravated robbery, aggravated burglary and aggravated assault, and order judgment entered, if appropriate, for burglary under Utah Code Ann. §76-6-202 (1953 as amended).

POINT III

THE CHARGE OF AGGRAVATED ROBBERY SHOULD NOT HAVE GONE TO THE JURY SINCE ALL OF THE ELEMENTS WERE NOT PROVEN.

The Appellant was convicted of aggravated robbery, a violation of Utah Code Ann. §76-6-302 (1953 as amended). That statute reads:

> (1) A person commits aggravated robbery if in the course of committing robbery, he:
> (a) Uses a firearm or a facsimile of a firearm, knife or a deadly weapon; or
> (b) Causes serious bodily injury upon another.
> (2) Aggravated robbery is a felony of the first degree.
> (3) For the purposes of this part, an act shall be deemed to be 'in the course of committing a robbery' if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

The robbery statute, Utah Code Ann. §76-6-301 (1953 as amended) states, "Robbery is the unlawful and intentional taking of personal property in the possession of another from his person or immediate presence, against his will, accomplished by means of force or fear."

The elements that must be proved, then, for aggravated robbery are: (1) that there was an intentional taking of personal property; (2) that the property was in the victim's possession; (3) that the taking was from the victim's person or immediate presence; (4) that the taking was accomplished by means of force or fear; and (5) that during the course of committing the robbery, the perpetrator used a firearm, knife, deadly weapon, or facisimile thereof, or caused serious bodily injury upon another. The evidence presented at trial did not establish each of these necessary elements.

At trial no evidence was presented that anything was taken from the person of the victim or from her immediate presence by means of force or fear. This case can be distinguished from this court's holding in State v. Ulibarri, 668 P.2d 568 (1983). In that case a person leaving a store was stopped by a clerk and asked to pay for beer. The defendant in that case then put his hand in his pocket, acted as a gunman and said, "Everything's cool, hold it there or I'll blow you away." In Ulibarri this court held that when the owner of a premises takes precautions against thievery and his opposition is overcome as he interposes himself to prevent the theft, the use of force concurrent or concomitant with the taking constituted robbery. In Uliberri the theft occurred in the presence of the victim which distinguishes it from the present case.

In this case any taking occurred in the other rooms of the home, not in the bedroom where the victim was assaulted, and Mrs. Pippy was unaware of such taking (T. 241). The victim also testified that she heard no sounds from other parts of her home after she was attacked (T. 278).

In considering the forceful taking element, commentators provide this insight: " The offense is robbery only if the force, actual or constructive, is part of the res gestae of the larceny." (citations omitted.)

Wharton's Criminal Law, 12th Ed., Robbery §559 says:

> Robbery is not committed when the victim is not aware that the defendant has taken the victim's property until after the defendant has done so and is leaving.
>
> When the defendant is able to take possession of the property without the use of force or fear but then employs force or fear in order to keep the property or to effect his escape, it is generally held that his offense is not robbery. (citations omitted.)

State v. Aldershorf, 556 P.2d 371 (Kansas 1976) noted Wharton's observations that there was conflict in some states because of the uncertainty as to when the taking is completed.

> Some cases have held that the snatching of property from the presence of an owner or his agent and a use of force or intimidation in carrying it away constitutes robbery, usually on the theory that the taking was not effected until the property was carried away, and any violence used in making an escape after the snatching was in effect violence in the taking. The problem raised by these cases has been met in some jurisdictions by statutes which define robbery so as to include the use of force to resist the retaking of the property. (citations omitted.)

556 P.2d at 374. Ulibarri, a per curiam opinion muddied this

issue in Utah because it held that if force is used to prevent the retaking of property, a robbery has occurred, despite the language of Utah's robbery statute that does not include force in the retaking as robbery.

The Aldershorf court then laid down this test:

> "We believe that the test should be whether or not the taking of the property has been completed at the time the force or threat is used by the defendant. This must of necessity be determined from the factual circumstances presented in the particular caes before the court."

556 P.2d at 375.

In this case no force was used against the victim in order to take items from her home by means of force or fear. Neither was there any attempt to take by force such items. The victim was assaulted and asked if she had any gold or silver. When she replied that she did not she was beaten, apparently in anger and frustration. Any taking occurred before the assault of the victim (as she remained conscious and heard nothing from the other rooms afterwards) and no effort was made by the victim to prevent the taking. This case is clearly different than Ulibarri in that nothing was taken from the victim's presence.Therefore neither a robbery nor aggravated robbery occurred. The jury showed its concern in this regard by asking for a definition of immediate presence (T. 713).

Thus it was error to allow the charge of aggravated robbery to go to the jury as an essential element was not proven.

POINT IV

THE TRIAL COURT ERRED IN GIVING AN AIDING AND ABETTING INSTRUCTION WHEN THERE WAS NO EVIDENCE OF SUCH ACTIVITY.

Appellant admitted during the trial that he had entered the home of the victim earlier in the evening of the attack (T. 583). He admitted leaving his coat there because he needed a warmer coat. However no evidence was presented that Juan Cantu was present in the house at the time of the assault other than the victim'a unreliable eyewitness identification.

In State v. Pacheco, 27 Utah 2d 881, 495 P.2d 808 (1972) this court stated that it was prejudicial error to give an aiding and abetting instruction where there was no evidence of aiding and abetting. Although that case was decided before the enactment of Utah Code Ann. §76-2-202 (1978), this court in State v. McCardell, 652 P.2d 942 (1982) reaffirmed the rule that "it is prejudicial error to give an aiding and abetting instruction if there is no evidence of such activity" 652 P.2d at 945.

In this case the only evidence placing the Appellant in the victim's house at the time of the assault was the victim's eyewitness testimony. If the Appellant was the person the victim saw then he would have to be guilty as a principal and not one who is criminally liable as an aider and abettor. Appellant's counsel made a timely objection (T. 649) to the aiding and abetting instruction (Jury Instruction No. 28) which was given to the jury (Addendum E).

In State v. Kerekes, 622 P.2d 1161 (Utah 1980) this court defined an accomplice as "one who is also criminally liable for the conduct charged." Id. at 1166. In State v. Gee, 28 Utah 2d 96, 498 P.2d 662 (1972) this court said:

> ...Furthermore, mere presence combined with knowledge that a crime is about to be committed where the person contributes nothing to the doing of the act, will not of itself constitute one an accomplice.

Id. at 665.

In this case although Appellant might have known that others were going back to Mrs. Pippy's home to steal property, as his testimony indicated, he did nothing to instigate, encourage or assist anyone in committing the crime, and refused to leave his house to go with them (T. 597).

In State v. Kerekes, this court stated:

> Nevertheless, even if one has lent aid and encouragement, voluntary abandonment of his participation prior to the commission of the crime relieves him of criminal liability for its commission providing the abandonment was communicated to the remaining parties and occurred prior to a time when the crime had become so inevitable that its commission could not reasonably be stayed.

622 P.2d at 1166.

In this case Appellant had abandoned the act and had communicated to the remaining parties before they returned to the victim's house that he wanted nothing to do with burglarizing a house where someone was present (T. 588). Appellant did enter the victim's house earlier in the evening and is guilty of burglary. There was no evidence offered to prove that Appellant re-entered the house at the time the

victim was assaulted other than the victim's suspect eyewitness testimony.

This case requires especially close scrutiny of the aiding and abetting instruction in light of the rather tenuous identification of Mr. Cantu. If the eyewitness identification is to be believed, then the Appellant would be guilty as a principal and the abetting instruction would have been unnecessary and prejudicial, providing an unsupported, yet alternate, basis for conviction. If the eyewitness testimony was not believed then the jury may have convicted the Appellant as an aider and abettor even though there was no evidence that he did in fact aid and abet.

In Napier v. Commonwealth, 306 Ky. 75, 206 S.W.2d 53 (1947) the court said (about jury instructions):

> "A trial court, especially a regular circuit judge, wields a tremendous influence on the minds of jurors; and it is not unusual for a jury to conclude that 'technical' rules of evidence tend to suppress 'facts' which in their opinion should be introduced in evidence; and when the court instructs them upon an issue concerning which no evidence was introduced, jurors sometimes gather the impression that the court is attempting to point out the 'true facts' in the unauthorized instruction. Oftentimes this results in the jury's 'reading between the lines' of the evidence and arriving at an erroneous conclusion. Such being true, the court meticulously should follow the evidence in instructing the jury."

206 S.W.2d at 57.

In this case it is possible that the jury believed that there was evidence of aiding and abetting because of the jury instruction even though no such evidence was presented.

As it is impossible to determine under which theory the jury convicted the Appellant, this erroneous instruction requires these convictions be reversed. It seems inappropriate to allow the state to argue throughout the trial that the Appellant is the one who assaulted the victim because the victim positively identified the Appellant but then say to the jury that even if the Appellant wasn't the one who actually assaulted the victim that he should nevertheless be found guilty. Either Juan Cantu attacked the victim or there is no evidence that he was in the house at the time. Allowing Jury Instruction No. 28 unduly prejudiced him and reversal is required.

POINT V

THE TRIAL COURT ERRED IN NOT ARRESTING JUDGMENT OR MODIFYING JUDGMENT TO GUILTY AND MENTALLY ILL WHEN APPELLANT WAS FOUND TO BE MENTALLY ILL PRIOR TO SENTENCING.

During the course of the trial Appellant's counsel became aware that Mr. Cantu was showing signs of mental illness. When his symptoms increased in severity after his conviction, defense counsel asked that an alienist be appointed. The court consented and Dr. Breck LeBegue was appointed. He evaluated Appellant and found him to be mentally ill (See Addendum B).

Thereafter, Appellant's counsel made a motion to arrest judgment under Utah Code Ann. §77-35-23 (1982 Supp.) which provides:

> §77-35-23. Rule 23 - Arrest of judgment. At any time prior to the imposition of sentence, the court upon its own initiative

> may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment. Upon arresting judgment the court may, unless a judgment of acquittal of the offense charged is anew or retried, or may enter any other order as may be just and proper under the circumstances.

In this case Appellant is mentally ill as defined in Utah Code Ann. §64-7-28(1) (1953 as amended), which provides:

> (1) "Mental illness" means a psychiatric disorder as defined by the current Diagnostic and Statistical Manual of Mental Disorders which substantially impairs a person's mental, emotional, behavioral, or related functioning.

In this case, Utah Code Ann. §77-35-23 required the trial court to arrest judgment because Appellant was mentally ill at a time prior to the imposition of sentence.

Appellant requested that judgment be arrested or, failing that, to modify the judgment from guilty to guilty and mentally ill under the provisions of Utah Code Ann. §77-35-21.5 (1983 Supp.) to make Appellant elligible for the treatment Dr. LeBegue recommended. The trial court's denial was error under Utah Code Ann. §77-35-23 and this court should set aside the judgment and order a new trial, unless the resolution of other issues compels a more favorable result.

CONCLUSION

For any or all of the foregoing reasons, Appellant seeks reversal of his convictions and remand of his case to the District Court for dismissal of some or all charges and/or a new trial, or a finding of guilty of burglary, a second degree felony, (or guilty and mentally ill).

RESPECTFULLY SUBMITTED this 3rd day of July, 1986.

Jo Carol Nesset-Sale

JO CAROL NESSET-SALE
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I, JO CAROL NESSET-SALE, hereby certify that four copies of the foregoing Appellant's Brief will be delivered to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this 3rd day of July, 1986.

Jo Carol Nesset-Sale

JO CAROL NESSET-SALE
Attorney for Defendant/Appellant

DELIVERED by _____ this ____ day of July, 1986.

ADDENDUM A

IN THE FIFTH CIRCUIT COURT FOR THE STATE OF UTAH

SALT LAKE CITY; SALT LAKE DEPARTMNENT

* * *

STATE OF UTAH,	:	
Plaintiff,	:	Civil No. 85FS0223
vs.	:	Deposition of:
DAN A. CANTU,	:	LINE-UP
Defendant.	:	

* * *

Line-up, taken at the instance and request of the State, at the Salt Lake Jail Line-Up Room, Salt Lake City Utah, on the 13th day of August, 1985, before DIANE M. WINTER, a Certified Shorthand Reporter, Utah License No. 235, and Notary Public in and for the State of Utah.

* * *

A P P E A R A N C E S

For the Plaintiff: David Walsh, Esq.
County Attorney
431 South 300 East
2nd Floor
Salt Lake City, Utah 84111

For the Defendant: JO CAROL NESSET-SALE
SALT LAKE LEGAL DEFENDERS
Attorney at Law
333 South 200 East
Salt Lake City, Utah 84111

* * *

I N D E X

* * *

P R O C E E D I N G S

MS. NESSET-SALE: We could begin now. I'm Jo Carol Nesset-Sale. I have requested this line up.

In addition to myself, David Walsh, Deputy County Attorney, is present, as well as Sargeant Mallas from the Sheriff's Office, and eight gentlemen for this line up.

MR. WALSH: And the record should also reflect that you have arranged, have you not, Jo Carol, the arrangement as you want them to be in?

MS. NESSET-SALE: Yes. I have placed the eight gentlemen in the positions that I'd like them to be in. They will each now in turn give us their name, age, height and weight, after which I might make some additional comments about the line up.

There are no other persons other than the named persons presently in the room, except for the court reporter.

MR. WALSH: That's correct. And let's start out, we're all going to have to do the same thing, we're going to ask you to keep your hands out at your sides. So let's start out now and all do that if you would, please.

Gentleman number one, would you step forward, please. Would you tell us your name.

GENTLEMAN NO. 1: My name is Joe K. Anderson.

MR. WALSH: Your height, sir?

GENTLEMAN NO. 1: Is five eight.

MR. WALSH: And your weight?

GENTLEMAN NO. 1: About 162.

MR. WALSH: And your age?

GENTLEMAN NO. 1: 21.

MR. WALSH: Thank you.

MS. NESSET-SALE: Mr. Anderson, are you an ethnic minority?

GENTLEMAN NO. 1: Excuse me?

MS. NESSET-SALE: Are you white, are you Mexican?

GENTLEMAN NO. 1: No, I'm not Mexican.

MS. NESSET-SALE: Are you white; do you consider yourself caucasion?

GENTLEMAN NO. 1: No, I don't.

MS. NESSET-SALE: What are you?

GENTLEMAN NO. 1: I'm Italian.

MS. NESSET-SALE: Okay. All right.

MR. WALSH: Gentleman number two.

GENTLEMAN NO. 2: Eddie Ramos, five ten and a half, 165, 38.

MR. WALSH: All right. Thank you, sir.

MS. NESSET-SALE: And if you are a minority, would you add if you are. If you are Mexican, if you are white, if you are Italian. Okay.

MR. WALSH: Are you, sir?

GENTLEMAN NO. 2: Chicano.

MR. WALSH: All right.

MS. NESSET-SALE: Number three.

GENTLEMAN NO. 3: Runel Juan Martinez, five eight and a half, 145, 32, Spanish.

MR. WALSH: Thank you. Gentleman number four.

GENTLEMAN NO. 4: Tony DeHerrerar, five eight, 33, 176, Chicano.

MR. WALSH: Thank you. Gentleman number five.

GENTLEMAN NO. 5: Albert Lozano, I'm 32 years old, I'm five 11, 160 pounds, and I'm Mexican.

MR. WALSH: Thank you, sir.

MS. NESSET-SALE: Number six.

GENTLEMAN NO. 6: Juan Cantu.

MR. WALSH: Your age?

GENTLEMAN NO. 6: 35.

MR. WALSH: Your height?

GENTLEMAN NO. 6: Six foot.

MR. WALSH: Your weight?

GENTLEMAN NO. 6: 150.

MR. WALSH: All right.

MS. NESSET-SALE: Are you Spanish?

GENTLEMAN NO. 6: Yes.

MR. WALSH: All right. Can we keep our hands to our sides, gentlemen, please.

Gentleman number seven.

GENTLEMAN NO. 7: My name is Joe G. Trujillo, age 22, I weigh 140, and I'm Chicano.

MR. WALSH: Your height, sir?

GENTLEMAN NO. 7: Six one.

MR. WALSH: All right. Thank you. Gentleman number eight.

GENTLEMAN NO. 8: Mike Valdez, 155, 18, five nine, Chicano.

MR. WALSH: Thank you, sir.

MS. NESSET-SALE: My observations about the line up, and if I could just see your arms, if you would keep your arms at the side, is that number one is quite tattooed on both arms, especially the left arm. Number three is tattooed on the left forearm and hand. Number seven is tattooed on the inside of the left forearm. They appear to be the only visible tattooes. As far as facial hair, number one has goatee and mustache, two, a full mustache, three, full mustache, four, the same, five, the same, six, a mustache and sort of a straggly short beard, seven is clean shaven as is number eight. All gentlemen have dark brown hair, although number six is considerably grayed. Number four has a little bit of gray, not much. And the rest are dark hair.

When the victim, alleged victim arrives, she's not present yet. You will not repeat what you've just done with your name and height. That was just for the record. What you

will do, we'll have you do now, we'll have you practice since she's not here. And I'm going to have number one demonstrate what you are going to do. If we do it and just listen carefully and be serious, it won't take us long to get through the line up.

I'll say number one, will you take one step forward. Would you make a quarter turn to the left, quarter turn, another, face forward. Number one, will you now walk to the spot in front of number eight, and face forward when you get there Would you now make those same quarter turns to the left, back forward. Would you now walk back to the spot in front of number one and face forward. Step back, sir.

Number two, step forward. Would you make quarter turns to the left. Would you now walk, sir, to the spot in front of number eight and face forward.

Number one, hands at your side, please. Thank you.

Now slow quarter turns to the left, Eddie. Would you now walk back to the spot in front of number two and face forward. Step back.

Number three, step forward. Wait a minute. Face forward. You've got to keep your face looking ahead. Okay. Now, would you make slow quarter turns to the left looking up. That's good. Would you now walk to the spot in front of number eight and face forward. Slow quarter turns to the left, sir. Would you now walk back to the spot in front of

number three and face forward. Step back. Thank you.

Number four, step forward. Slow quarter turns to the left, sir. Walk to the spot in front of number eight, face forward. Slow quarter turns to the left. Face forward. Walk back to the spot in front of number four and face forward. Step back.

Now five through eight are going to be walking in front to the spot in front of number one. Okay.

Number five, will you step forward. Slow quarter turns. Face forward again. Would you now walk to the spot in front of number one, sir. Face forward. Slow quarter turns around. Face forward. Would you now walk back to the spot in front of number five. Face forward. Step back.

Number six, step forward. Slow quarter turns to the left. Keep going, that's too slow. But don't stay there all day. Now walk to the spot in front of number one and face forward. Slow quarter turns to the left, sir. Keep going, again, again. Would you walk to the spot in front of number six. Step back.

Now we shouldn't have to say quarter turn left, quarter turn left, quarter turn left. Just once you've started quarter turns, stop briefly, continue to turn. Okay.

Number seven, step forward. Hands at your side. Quarter turns around. Walk to the spot in front of number one. Face forward. Quarter turns around. Walk to the spot

in front of number seven. Face forward. Step back, please thank you.

And number eight, quarter turns. Face forward. Walk to the spot in front of number one, sir. Face forward. Quarter turns around. Back to the spot in front of number eight. Step back.

Now, if you are asked to say anything, you will do that when you first step forward. It will be step forward, repeat after me, and the statement will be given to you. And of course you'll have a chance to practice the statement so that we can make sure everybody is being appropriately serious. This is involving a first degree felony, so it's a serious matter. And we appreciate your willingness to be serious about it.

Has she arrived yet?

MR. WALSH: Yes.

MS. NESSET-SALE: Okay.

MR. WALSH: One other note, gentlemen. That is, don't do anything to draw attention to yourself. We want everybody to look the same as much as possible. And we want all of you to act the same as much as possible.

GENTLEMAN NO. 3: Is the actual person involved here?

MS. NESSET-SALE: She's not here at this moment.

GENTLEMAN NO. 3: No, I mean --

MS. NESSET-SALE: We don't know if the actual person is involved. That's one of the things we're trying to find out, is if an identification can be made.

David, is there any special statement?

MR. WALSH: I don't know. I'll go ask her. But before we do, Jo Carol, do you have any objection to the constitution of the line up?

MS. NESSET-SALE: The line up is imperfect as all line ups are, especially I think numbers one, two and eight are not nearly as Hispanic looking as the rest of the line up. But I'm also satisfied that Sargeant Mallas has done the best he can do with the jail population. So I am satisfied with proceeding with the line up.

MR. WALSH: No objection to that? All right.

One other thing. I would prefer myself to do it since she's going to be my witness. I would like to have them, I mean give them directions.

MS. NESSET-SALE: No problem. But would you find out first if there is something to be said before they just --

MR. WALSH: I will. Let me just ask Sergeant for the record, Sergeant, is this the best we can do with the population?

SERGEANT MALLAS: It is, under the circumstances. Being a taller Hispanic, why they are usually shorter, and it was hard enough to get these people.

MR. WALSH: That's all we need to get on the record.

MS. NESSET-SALE: Just hang loose while we find out if there is a statement. If so, we'll practice that.

Number four, have you ever been in the military?

GENTLEMAN NO. 4: No.

MS. NESSET-SALE: You carry yourself as though you are an ex-marine. I just wondered. A poster child, perhaps, of the marine. It will just be a minute. He's just going to find out if there is a statement. When you come back, make sure you are on the same number you are on now. Now that I've played musical people.

(Off the record.)

MS. NESSET-SALE: Any statements?

MR. WALSH: Yes. "Where's your silver and where's your gold, you old son of a bitch."

MS. NESSET-SALE: And that is a statement made by the same person who hit her?

MR. WALSH: Apparently.

MS. NESSET-SALE: I want to make sure. Can we bring her in?

(Off the record.)

MR. WALSH: Would you tell us, Mrs. Pippy, your full name, please. We're on the record. We have a court reporter with us today and she's going to record the proceedings. So would you tell us your name, your full name and your address.

THE WITNESS: My full name, you mean maiden name also?

MR. WALSH: No, just your first and last name now.

THE WITNESS: Adelia, A-d-e-l-i-a, Pippy, P-i-p-p-y.

MR. WALSH: Okay. And you are the victim in this case?

THE WITNESS: Yes.

MR. WALSH: I guess we don't need the address. Okay.

Now, Mrs. Pippy, were some statements made to you during the course of this crime?

THE WITNESS: Oh yes.

MR. WALSH: Was more than one person involved?

THE WITNESS: There were two in my bedroom.

MR. WALSH: All right. And there was a statement or a number of statements made to you?

THE WITNESS: Oh yes, but they were all by the one that hit me on the head.

MR. WALSH: They were one and the same person that made the statements and also hit you on the head; is that true?

THE WITNESS: (Witness nodding head.)

MS. NESSET-SALE: Can you tell me, did anybody else speak, any of the other perpetrators, other than the one who struck you, that you remember?

THE WITNESS: No. The one standing to the side, I looked through my eye and I could see he had Levi's on. I could see a little bit of black hair. But I could not see the race. And I didn't turn my head because somewhere throughout my lifetime I've heard that if you are ever hit with a rock or anything in the temple, there are certain spots on your head, that it would kill you, you know.

MR. WALSH: Now the statement that was made, Mrs. Pippy, was what?

THE WITNESS: He said, "Where's your silver and your gold." I says, "I don't have any. I live on Social Security."

MR. WALSH: Okay.

MS. NESSET-SALE: Is that when you were hit, then, after that statement was made?

THE WITNESS: And I was hit on the head and I looked down and the club was broken right smack in two and laying on the carpet in the bedroom.

MR. WALSH: Now, did he call you a name, Mrs. Pippy?

THE WITNESS: He called me an old son of a bitch.

MR. WALSH: When did he say that in relationship to when he asked where your silver and your gold was?

THE WITNESS: It was before.

MR. WALSH: So how did it go, how were the statements made?

THE WITNESS: "You old son of a bitch, where's your silver and your gold."

MS. NESSET-SALE: And then you were struck when you said you didn't have any; is that right?

THE WITNESS: I was hit on the head.

MR. WALSH: Okay.

MS. NESSET-SALE: Okay. And there is no question that the person who made that statement was the one who clubbed you, right?

THE WITNESS: No question at all.

MS. NESSET-SALE: Okay. So we'll need to have them practice that.

MR. WALSH: Could we have you just step out again into the corridor, Mrs. Pippy?

THE WITNESS: You bet you.

MS. NESSET-SALE: So the statement will be, you old son of a bitch, where's your silver, I suppose, where's your silver and your gold. Would you agree?

MR. WALSH: Yes.

MS. NESSET-SALE: Okay. Could you have them come back?

The victim has left the room, the record should note.

Gentlemen, just to let you know before Mr. Walsh says something, the victim is not in the room. It's just the

original group here.

There was something that was said that each of you is going to practice. And Mr. Walsh will assist you and listen carefully to what was said. And for you to say it in the manner that it was certainly said to the victim, okay?

MR. WALSH: Okay. Now this is the quotation and we want each of you to say it when you step forward, when your turn comes the first time.

The statement is, "You old son of a bitch, where's your silver and your gold."

MS. NESSET-SALE: Got it? Okay.

MR. WALSH: "You old son of a bitch, where's your silver and your gold." Okay.

Gentleman number one, would you step forward. Would you say that, please.

GENTLEMAN NO. 1: "You old son of a bitch, where's your silver and your gold."

MR. WALSH: All right. Thank you. Would you step back, please.

Gentleman number two.

GENTLEMAN NO. 2: "You old son of a bitch, where's your silver and your gold."

MS. NESSET-SALE: Now let me indicate this statement was said just before this woman, elderly woman was clubbed in the head. So it was probably an angry statement followed by

angry violence toward an old lady. So none of you should -- there is nothing funny whatever about this. So say it in that kind of spirit. All right?

MR. WALSH: Gentleman number two, do you want to try it again.

GENTLEMAN NO. 2: "You old son of a bitch, where's your silver and your gold."

MS. NESSET-SALE: You've got to be louder. We can't hear you.

GENTLEMAN NO. 2: "You old son of a bitch, where's your silver and your gold."

MS. NESSET-SALE: Not serious enough, gentlemen. This lady was clubbed within an inch of her life and she's entitled to a fair chance to identify who might have done that. It could have been your grandmother clubbed. All right Please say this seriously.

GENTLEMAN NO. 2: "You old son of a bitch, where's your silver and your gold."

MR. WALSH: Okay. Thank you.

Gentleman number three.

GENTLEMAN NO. 3: "You old son of a bitch, where's your silver and gold."

MR. WALSH: Okay. "And your gold"

GENTLEMAN NO. 3: "And your gold."

MR. WALSH: All right. Thank you.

Gentleman number four.

GENTLEMAN NO. 4: "You old son of a bitch, where's your silver and gold."

MR. WALSH: Okay. Say it with a little anger. You've got to mean it, guys.

GENTLEMAN NO. 4: "You old son of a bitch, where's your gold and silver."

MR. WALSH: "Where's your silver and your gold."

MS. NESSET-SALE: "Silver and your gold."

MR. WALSH: All right. Now you are going to need to practice.

GENTLEMAN NO. 5: "You old son of a bitch, where's your silver and your gold."

MS. NESSET-SALE: Good.

MR. WALSH: Okay. Sir, "You old son of a bitch, where's your silver and your gold."

GENTLEMAN NO. 6: "You old son of a bitch, where's your silver and your gold."

MR. WALSH: Okay. Thank you.

GENTLEMAN NO. 7: "You old son of a bitch, where's your silver and gold."

MR. WALSH: "And your gold."

GENTLEMAN NO. 7: "And your gold."

MR. WALSH: All right. Thank you.

GENTLEMAN NO. 8: "You old son of a bitch, where's

your silver and your gold."

MS. NESSET-SALE: Good.

MR. WALSH: Thank you.

MS. NESSET-SALE: Good.

MR. WALSH: Let me just tell you something, guys. We've got two people involved in this who have substantial rights at stake. We have a defendant and we have a victim. And both have certain amount of rights and certain amount of respect. When she's in this room we only get one chance. And if somebody screws it up, we're all through. So don't screw it up.

GENTLEMAN NO. 3: Can you bring one of us at a time in here; would that be easier?

MS. NESSET-SALE: No. She needs to see all of you to compare heights and weights and sizes.

MR. WALSH: Okay. I'm serious about it. A whole lot is at stake.

MS. NESSET-SALE: I wanted to ask her one more question just about the voice before we do this. We probably ought to just have them troupe in.

MR. WALSH: Take them out, Sergeant.

MS. NESSET-SALE: Go on out. We'll have you back in just a minute. Please keep your voices up so we hear you the first time. Thank you.

(Off the record.)

MS. NESSET-SALE: Back to the same seat, Mrs. Pippy.

Mrs. Pippy, one question I wanted to ask you before we bring in the group of men. Do you remember anything about the voice, age, sex, if there was any accent of any kind or dialect, you know, southern, Italian, Hispanic, white, anything?

THE WITNESS: I don't remember any accent. I knew that it was a male voice and it was a male that hit me and it was a man. It wasn't any child.

MS. NESSET-SALE: All right. Thank you.

MR. WALSH: Thank you.

MS. NESSET-SALE: Okay, Sergeant.

MR. WALSH: The record should reflect that we now have the eight people who have been previously identified present. We also have in the auditorium Mrs. Pippy.

Gentlemen, we're going to now go through what we practiced before. We'd ask you to keep your hands at your sides and not draw attention to yourselves. When we go through this, we'll do it one at a time as we did. And we'd ask you to say the statement, "You old son of a bitch, where's your silver and your gold."

Okay. Gentleman number one, would you step forward, please. Would you say that statement.

GENTLEMAN NO. 1: "You old son of a bitch, where's your silver and your gold."

MR. WALSH: Would you make a quarter turn to your left, sir. Another quarter turn, another quarter turn, and another. Would you step to the far end of the platform, please. Would you make successive quarter turns, please. Would you please step to this end of the platform. Thank you.

Gentleman number two, would you step forward and say, "You old son of a bitch, where's your silver and your gold."

GENTLEMAN NO. 2: "You old son of a bitch, where's your silver and your gold."

MR. WALSH: Would you make successive quarter turns, please. Would you step to the far end of the platform. Would you make successive quarter turns. Would you please step back to this spot, sir. Thank you.

Gentleman number three, would you step forward and say, "You old son of a bitch, where's your silver and your gold."

GENTLEMAN NO. 3: "You old son of a bitch, where's your silver and your gold."

MR. WALSH: Okay. Would you please step to that far end. Thank you, sir.

Would you step forward, number four. Please say, "You old son of a bitch, where's your silver and your gold."

GENTLEMAN NO. 4: "You old son of a bitch, where's your silver and your gold."

MR. WALSH: Would you make successive quarter turns, please. Would you please step to the far end. Thank you, sir.

Gentleman number five, would you step forward and say, sir, "You old son of a bitch, where's your silver and your gold.

GENTLEMAN NO. 5: "You old son of a bitch, where's your silver and your gold."

MR. WALSH: Thank you, sir.

Gentleman number six, would you step forward. And would you say, "You old son of a bitch, where's your silver and your gold."

GENTLEMAN NO. 6: "You old son of a bitch, where's your silver silver and your gold."

MR. WALSH: Would you make quarter turns, please. Would you step to this end of the platform, make successive quarter turns, please. Okay. Would you please return to your spot. Thank you, sir.

Gentleman number seven, would you please step forward and say, please, "You old son of a bitch, where's your silver and your gold."

GENTLEMAN NO. 7: "You old son of a bitch, where's your silver and your gold."

MR. WALSH: Would you make successive quarter turns. Would you now please step to this end of the platform. Make

successive quarter turns, please. Thank you, sir.

Gentleman number eight, would you step forward, please, and say, "You old son of a bitch, where's your silver and your gold."

GENTLEMAN NO. 8: "You old son of a bitch, where's your silver and your gold."

MR. WALSH: All right. Would you make successive quarter turns, please. Would you step to this end of the platform. Make successive quarter turns, please, sir. All right. Thank you.

Mrs. Pippy, if you recognize somebody there, can you see all the numbers on the bottom of the floor where they are standing?

THE WITNESS: Yeah, I see the numbers.

MR. WALSH: All right. If you recognize somebody, would you remember what their number is, and we're going to have them leave now.

MS. NESSET-SALE: Let me just ask Mrs. Pippy, have you had enough time to see them? Do you need them to go through the walk or the speech again, or have you had enough time to see if you recognize anybody?

MR. WALSH: We need to know only, Mrs. Pippy, if more time will help you. If it won't help you, that's the only thing we need to know. We don't want any numbers. We just need -- do you understand what I'm asking? If you need

some more time, we can give you some more time. That's all we're talking about here, is if you need additional time.

MS. NESSET-SALE: We can't pick one of them out and have him do something. But if you want to see them all step forward again or walk again, we can do that. Or if you would like to hear each of them speak to you and make that statement again, we can have them do that. Would that be helpful or have they helped you all that they can?

THE WITNESS: There is only three that are --

MS. NESSET-SALE: We can talk about them after they've left the room and you are given a card. Is it all right if they leave now?

THE WITNESS: Oh yes.

MS. NESSET-SALE: We have not yet had the photograph. I'd indicate.

MR. WALSH: Maybe we better save them for a minute until we finish this.

MS. NESSET-SALE: Save them back there. Okay. Thank you, gentlemen.

MR. WALSH: Mrs. Pippy, let me give you this card. I don't know if you have a pen or a pencil. Here, let me give you my pen. And would you write your name at the top of that, please.

THE WITNESS: There wasn't any of those that were white.

MS. NESSET-SALE: I'm sorry, I didn't hear what she said.

MR. WALSH: I don't want to talk to you anymore. Let's just fill the card out. Okay?

THE WITNESS: Okay.

MS. NESSET-SALE: And that's if you recognize any one or more persons, you should note the number down.

MR. WALSH: We're just going to go through the first part here first.

THE WITNESS: I couldn't say right now if I recognized any.

MR. WALSH: We're just going to fill in the top portion of the card first.

THE WITNESS: Let's see, today is the 13th.

MR. WALSH: August 13th, okay. You can leave the case number blank on that. Now, you see that box down at the bottom of the card there, Mrs. Pippy? Now, if there is somebody that you recognized there as being the one who did this to you that night, then write his number there. If you don't recognize anybody, then either write a zero or just leave it blank.

THE WITNESS: It didn't look like any of these guys, really.

MR. WALSH: Okay. I don't want you to talk. If you need some time to think, that's fine.

THE WITNESS: Can I think a little on --

MS. NESSET-SALE: And this is really separate from the series of photographs that you saw before. Think about the person who was in your home with that club who made that statement. And if you can identify that person from this group, that's the number you should write. And if you can't identify that person as being in this group, as Mr. Walsh says, that's when you leave it blank or put a zero.

THE WITNESS: This guy I saw --

MS. NESSET-SALE: I'm sorry, I can't hear you.

THE WITNESS: This fellow in that mugshot, his hair was a little different. I don't know how they look in this line up.

MS. NESSET-SALE: I'm concerned you are focusing on the mugshot instead of now in a color, live situation. Think back to that night. Not the series of pictures you've seen. That apparently is confusing you. They were black and white, they were only from the chest up.

THE WITNESS: The length, yes.

MS. NESSET-SALE: This is real life. And think about that night. And it's okay either way. Its' okay to identify somebody and it's okay not to, whatever.

THE WITNESS: Let's see, I saw him from here up, it wasn't looking down, I was looking at the face. Unless his hair has changed, which here you go back to that mugshot, I

say that coat was only about that wide. He wasn't husky, if you know what I mean.

MR. WALSH: Yes, I see.

MS. NESSET-SALE: The only question, though, Mrs. Pippy, do you recognize the face of one of these eight men as being the face of the man who said those things to you and who hit you with the club? If you don't see the face up here, leave this blank. If you see the face, put the number down.

THE WITNESS: I can't say that I saw that face in that line up.

MR. WALSH: All right.

MS. NESSET-SALE: That's fine.

MR. WALSH: So you could just leave it blank. Okay. Do you want to step outside into the corridor, Mrs. Pippy? Thank you.

THE WITNESS: I don't want to send the wrong man up.

MS. NESSET-SALE: No, we'd like to send the right man up, not the wrong man.

THE WITNESS: By golly, I want to make sure I name him, because I know one thing, someone will be killed by him.

MS. NESSET-SALE: Well, I'm sure that that's a real possibility. Thank you for coming down, Mrs. Pippy.

THE WITNESS: I'm only too happy to.

MS. NESSET-SALE: I'll see you next week at the hearing.

THE WITNESS: You bet. Anyway you want.

MS. NESSET-SALE: I think Mr. Walsh is waiting for you, ma'am.

THE WITNESS: You bet. That's all right.

MS. NESSET-SALE: Bye Bye, Mrs. Pippy. I hope you are feeling a little stronger.

THE WITNESS: It takes time.

(Off the record.)

MR. WALSH: Gentlemen, you did very well. We appreciate your help. Thank you.

(At this time both attorneys have left. Officer Rick Somers is now taking two photographs under the direction of Sergeant Mallas.)

(The proceedings concluded at 2:05 p.m.)

* * *

C E R T I F I C A T E

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

THIS IS TO CERTIFY that the line-up, at the Salt Lake Jail, in the line-up named, was taken before me, Diane M. Winter, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, residing at Salt Lake City, Utah.

That the said witnesses, were by me, before examination, duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause.

That the testimony of said witnesses were reported by me in Stenotype, and thereafter caused by me to be transcribed into typewriting, and that a full, true and correct transcription of said testimony so taken and transcribed is set forth in the foregoing pages numbered from 3 to 27, inclusive, and said witness deposed and said as in the foregoing annexed deposition.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action, and that I am not interested in the event thereof.

WITNESS MY HAND and official seal at Salt Lake City, Utah, this 14th day of October, 1985.

Diane M. Winter

DIANE M. WINTER, C.S.R.
Utah License No. 235

NOTARY PUBLIC

My Commission Expires:
2-23-86

LINE-UP INSTRUCTIONS

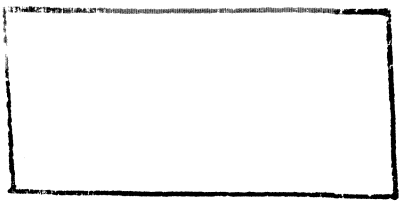
DATE: Aug 13/85

SIGNATURE: Adelia Kippy

CASE NUMBER: _____

If you recognize any person present in this line-up as the individual involved in the crime, please mark in the square below the number the person is standing on.

If you do not recognize anyone participating in this line-up, please leave the space blank.



ADDENDUM B

THE UNIVERSITY OF UTAH

DEPARTMENT OF PSYCHIATRY
SCHOOL OF MEDICINE
MEDICAL CENTER
50 NORTH MEDICAL DRIVE
SALT LAKE CITY, UTAH 84132
801 581-7951

December 10, 1985

Honorable Raymond S. Uno
Third District Court Judge
240 East 400 South
Salt Lake City, Utah 84111

Dear Judge Uno:

RE: Juan Cantu
CR 85-1047

Pursuant to court order under UCA 77-15-5 I evaluated Juan Cantu, recently convicted of aggravated burglary, robbery and assault, in the Salt Lake County Jail on December 6, 1985 for one and a quarter hours. In addition I reviewed the criminal information of the Salt Lake City Police Department investigation report of the crimes on December 22, 1984. Also, I spoke with his sister Corine Cantu, and another sister's mother-in-law (also an acquaintance) Oclidas Chicon.

ISSUES:

1) Whether the defendant is presently mentally ill.

2) Whether the defendant is presently competent to procede to sentencing, i.e. whether he, by reason of mental disease or deficit, is unable to comprehend the punishment specified for the offense charged, or unable to assist his counsel at the sentencing hearing.

3) Whether the defendant was competent during the month of October 1985, during his District Court trial.

OPINIONS:

1) The defendant presently appears to be suffering from a psychotic mental illness of undetermined type, probably schizophrenia.

2) Even though mentally ill, he is nevertheless competent to procede to sentencing, as he has a full appreciation of the nature and consequences of the sentencing process, and the punishment specified for the offense of which he was convicted.

3) Likewise, it appears that even though mentally ill during his trial, he was nevertheless able to comprehend the nature of the procedings against him, and was able to assist his counsel in his defense in rational ways, not withstanding some irrational behavior during trial such as providing Bible verses to his attorney.

DATA AND REASONING:

Juan Cantu is a 35 year old man convicted of aggravated burglary, robbery, and assault, in a trial during which evidence clearly placed him at the scene of the crime. He presently denies any guilt; although this denial is common in many if not most convicted felons, I believe it to be a symptom of his psychotic process as well.

Because the focus of my evaluation is his present mental state, I explored this to a greater extent than past history. However, contributing to this present understanding is the fact that he was hospitalized in a psychiatric hospital in San Antonio when he was a young teenager for approximately six months. Neither he nor his sister can give me a diagnosis nor kind of treatment offered at that time.

He states that he was educated through the sixth or seventh grade, but later received his GED while in prison. Past crimes have included drunk driving, the rape of a child (for which he served seven years), and attempted burglary.

He admits to an alcohol and drug history, consuming up to a "lid" of marijuana a day at times in the past.

During imprisonment in Texas for the sexual assault of the child, he stated that he hallucinated the voice of God and the voices of others, and became severely depressed to the extent he attempted to hang himself. He describes an extensive retreat into hyperreligiosity during that imprisonment, for which he was treated with the anti-psychotic medication Thorazine.

His present conversation is full of references to religious experience, such as hearing the voice of Jesus, seeing him in visions, and a over concern with religious work which he feels called to do. Specifically, he believes that he has been called to minister to criminal men from broken families, and he plans to do this on the street <u>if granted probation</u>.

Present Competency:

I emphasize the contingency, because, although his verbal productions are full of references to the hallucinated (I believe) voice of Jesus, he is able to maintain the perspective that he has been convicted of a serious crime, is required to appear in court before an earthly judge for sentencing for that crime; appreciates the purposes of sentencing, and the potential choices the judge might have (imprisonment, probation, 90 day evaluation, etc.); understands the possible length of time he could be imprisoned, and finally the fact that he would be imprisoned as a punishment for a crime of which he was convicted, rather than sent to the prison on a special religious mission.

The latter is important, because although he states that he will speak to others in prison about his religious beliefs, he would obviously prefer to carry on his life on the streets, and does not specifically carry the psychotic delusion that he is being imprisoned either for his religious beliefs, or for the purpose of carrying out his ministry.

Mental status examination during interview showed him to be alert oriented and cooperative. He answered my questions appropriately, psychotic behavior did not intrude upon the purpose of our evaluation (although it was obvious he much preferred to discuss his religious beliefs than to discuss the sentencing and possible imprisonment); and from his ability to cooperate with the intent of my interview, I must infer that he is able to do likewise with his attorney at sentencing.

Past Competency Inferred:

Although his psychotic religious beliefs intruded on his discourse with his attorney, they apparently did not substantially interfere with the process of defense, and were not disruptive at trial.

The possibility remains that his presence at his trial was purely physical, in that he was mentally preoccupied with his religious beliefs or even that he believed on the basis of a delusional system that he must remain uninvolved or even conceal exculpatory information. If information is available which is contradictory to my inferred opinion, such information must be given greater weight and credibility. Of particular importance is his actual behavior at trial, in the experience of both counsel and the court.

Prognosis and Treatment:

Delusional psychoses occurring during incarceration are not uncommon, are more frequent in those genetically and biochemically predisposed to the illness schizophrenia, and psychodynamically may be thought of as occurring in order to ward off overwhelming feelings of guilt, remorse and self-loathing, the severity of which may culminate in suicide attempts as they have in the past with this defendant.

Treatment of the illness consists of anti-psychotic medication, which may be made available in prison, or as an outpatient as a condition of probation.

Prognosis is poor. His self described religiosity in the past has not lead to significant decrease in criminal behavior, and is unlikely to do so in the future.

Further, because the experience is so intensely rewarding - few can claim the privilege of hearing Jesus' voice actually spoken aloud - he is unlikely to recognize his psychotic illness for what it is. Unfortunally the illness is likely to progress to severe depression and potential self destruction as it has in the past, so close observation and treatment are in my opinion mandatory.

Thank you for the opportunity to examine this defendant. If you have any questions please call me.

Sincerely,

Breck Lebegue, M.D.
Assistant Clinical Professor
Director Forensic Psychiatry Service
Diplomate, American Board of Psychiatry and Neurology
Diplomate, American Board of Forensic Psychiatry

cc: Jo Carol Nesset-Sale
Ted Cannon

BL/cl

ADDENDUM C

TABLE 4

POPULATION BY RACE (INCLUDING SPANISH ORIGIN) AND COUNTY OF RESIDENCE: UTAH, CENSUS, APRIL 1, 1980

DISTRICT AND COUNTY	NUMBER OF PERSONS AND RACE[1] TOTAL	WHITE	BLACK	AM. INDIAN ESKIMO AND ALEUT	ASIAN AND PACIFIC ISLANDER	OTHER	SPANISH ORIGIN
TOTAL	1,461,037	1,382,550	9,225	19,256	15,076	34,930	60,302
DISTRICT 1	92,498	88,386	224	1,508	1,069	1,311	2,023
DISTRICT 2N	296,073	278,264	4,460	1,512	3,144	8,693	14,055
DISTRICT 2S	645,099	607,840	4,224	4,694	8,163	20,178	33,262
DISTRICT 3	236,827	229,815	158	1,985	2,019	2,850	5,365
DISTRICT 4	47,087	45,869	28	533	222	435	696
DISTRICT 5	55,489	54,279	32	758	174	246	704
DISTRICT 6	33,840	31,261	8	2,245	77	249	755
DISTRICT 7	54,124	46,836	91	6,021	208	968	3,442
BEAVER	4,378	4,316	--	27	24	11	85
BOX ELDER	33,222	30,863	11	1,294	375	679	1,299
CACHE	57,176	55,449	213	206	687	621	708
CARBON	22,179	21,231	78	137	74	659	2,423
DAGGETT	769	767	--	1	1	--	13
DAVIS	146,540	138,365	2,235	754	1,709	3,477	5,436
DUCHESNE	12,565	12,175	2	292	29	67	177
EMERY	11,451	11,214	--	120	57	60	233
GARFIELD	3,673	3,589	1	66	9	8	36
GRAND	8,241	7,966	2	164	37	72	353
IRON	17,349	16,782	18	372	61	116	239
JUAB	5,530	5,461	1	47	4	17	55
KANE	4,024	3,963	1	38	5	17	46
MILLARD	8,970	8,557	1	137	135	140	157
MORGAN	4,917	4,845	--	22	20	30	49
PIUTE	1,329	1,321	--	5	1	2	17
RICH	2,100	2,074	--	8	7	11	16
SALT LAKE	619,066	583,962	4,056	4,324	8,021	18,703	30,867
SAN JUAN	12,253	6,425	11	5,600	40	177	433
SANPETE	14,620	14,192	24	148	60	196	268
SEVIER	14,727	14,452	--	178	20	77	175
SUMMIT	10,198	10,073	7	45	27	46	204
TOOELE	26,033	23,878	168	370	142	1,475	2,395
UINTAH	20,506	18,319	6	1,952	47	182	565
UTAH	218,106	211,320	148	1,879	1,979	2,780	5,040
WASATCH	8,523	8,422	3	61	13	24	121
WASHINGTON	26,065	25,629	12	255	75	94	298
WAYNE	1,911	1,886	2	18	2	3	24
WEBER	144,616	135,054	2,225	736	1,415	5,186	8,570

SOURCE: "UTAH, FINAL POPULATION AND HOUSING UNIT COUNTS," 1980 CENSUS OF POPULATION AND HOUSING, ADVANCE REPORTS, PHC80-V-46, BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, ISSUED MARCH, 1981.

[1]COUNTS OF THE POPULATION BY RACE AND SPANISH ORIGIN ARE PROVISIONAL. PERSONS OF SPANISH ORIGIN MAY BE OF ANY RACE.

ADDENDUM D

1. General

   a. Juror is disqualified from serving in any case:

      i Felony conviction

      ii. Want of any legal qualification rendering a person a competent juror.

      iii. Unsoundness of mind or body rendering him incapable of performing juror duties (17-30-17, Utah Code Annotated)

2. Particular

   a. Juror is disqualified from serving in action on trial

      i Implied bias

         (a) Existence of facts ascertained renderning juror's mind contra to impartiality.

         (b) Existence of state of juror's mind contra to impartiality (77-30-18, Utah Code Annotated)

III
JURY SELECTION -- MECHANICS

After each side has exercised both preemptory challenges and challenges for cause, if any, the panel will be selected. In misdemeanor matters, the jury panel may consist of four jurors and in felony matters of eight jurors.

In making challenges, the baliff will hand the attorney for the defendant first a card bearing the names of all of the jury panel; at which time counsel for the defense will strike his first preemptory challenge indicating that it is defendant's number one challenge and placing his initials after the challenge. The card will then be passed to the State who will exercise his first preemptory challenge in the same fashion and this will occur until the specified number of preemptory challenges have been exercised. The panel will then be selected and sworn.

Juror Qualifications

1. While there is no specific rule as to which individuals make good jurors favorable to the prosecution, as a general rule, the following classifications can be asserted generally:

   a. Technical professionals — Good jurors

   b. School teachers — Poor jurors

c.	Minorities	Poor for blue collar crimes
d.	Minorities	Good for white collar crimes
e.	Physically infirmed	Good jurors
f.	The very young	Poor jurors
g.	The very old	Good jurors
h.	Caveat	Watch for hearing problems
i.	Civil service	Good jurors
j.	Ex-military	Good jurors
k.	Artists and Musicians	Poor jurors
l.	Bartenders	Poor jurors except on robbery
m.	Insurance men	Very good jurors
n	People wearing sunglasses	Poor jurors
o.	Some law training	Poor jurors
p.	social workers	Poor jurors

AS A GENERAL RULE ALWAYS GET RID OF THE ODD JUROR, I.E., WOMEN'S LIBBER, HIPPY TYPES, THE REVOLUTIONARY, ETC.

AS A RULE OF THUMB, WHEN IN DOUBT -- STRIKE

C. The Voire Dire

1. Voire Dire examination in Utah courts is generally done by the trial judge. Many prosecutors tend to let the judge do all of the work, but there may be certain questions that the judge will not ask or not ask properly that the prosecutor will want to ascertain. The prosecutor may ask the questions himself, but more properly he should request of the Court that a specific question be asked the individual juror or the panel in general. A prosecutor should be particularly mindful of the following kinds of cases and proceed with a more detailed and complex voire dire if you feel that the judge has not properly examined the panel. The following kinds of issues should be dealt with some care on voire dire:

   a. Qualification in capital cases.

   b. Circumstantial evidence, i.e., not second class evidence

ADDENDUM E

INSTRUCTION NO. 28

You are instructed that not only every person who directly commits the criminal act, but also any person, acting with the mental state required for ther commission of the offense, who solicits, requests, commands, encourages or intentionally aids another person to engage in the conduct which constitutes an offense, shall be criminally liable as a party for such conduct.

ADDENDUM F

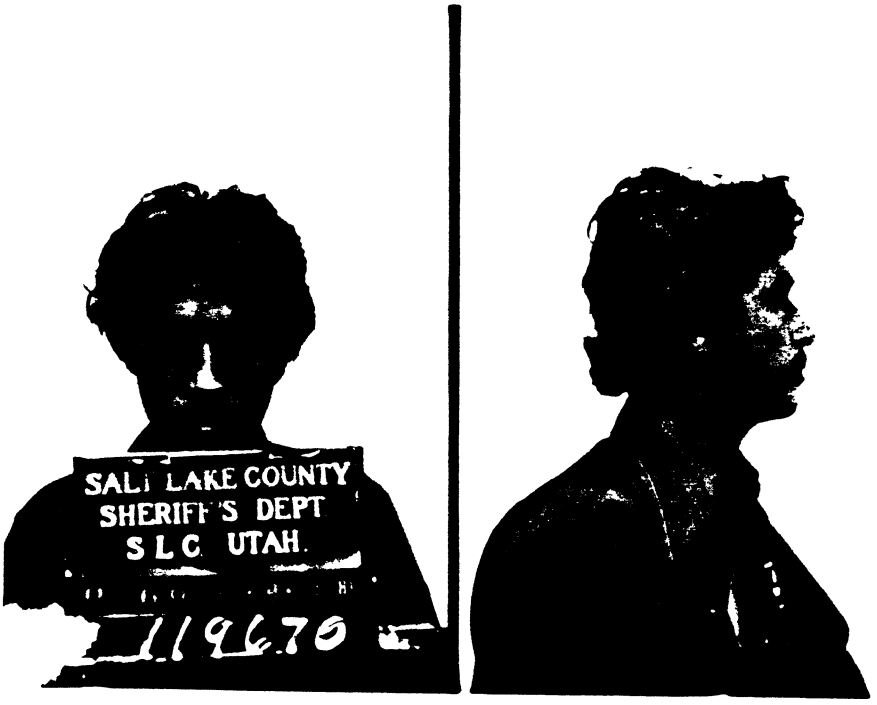


Photo of Juan Cantu

Photo Mrs. Pippy identified as her assailant (T.300)